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In The
Supreme Court of the United States

1964

October Term, 1964
No. — [redacted]
110

EDWARD A. KING,
Petitioner

vs:

HOWARD YAEGER, Warden, New Jersey State Prison,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

SAMUEL KAGLE,
OSCAR BROWN,
IVAN C. BASH,
Counsel for Petitioner.

1500 Bankers Securities Bldg.,
Philadelphia 7, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

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No.

Edward A. King,

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vs.

Howard Yaegar, Warden. New Jersey State Prison,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on March 17, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported in 41 N.J. 595, 198 A. 2d 158, and is appended hereto, infra, p. 14. The opinion of the Supreme Court of New Jersey in the appeal from the judgment of conviction is reported in 37 N.J. 285, 181 A. 2d 158. The opinion of the Hudson County Court is unreported but appears in the Appendix pp. 12a-16a.

JURISDICTION

The opinion of the Supreme Court of New Jersey was filed on March 17, 1964. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), since a right, privilege or immunity is claimed under the Fourteenth Amendment of the Constitution of the United States. Federal questions involving suppression of material evidence favoring accused by the State during a murder trial were raised initially by Complaint for a writ of habeas corpus which was filed in the Hudson County Court, New Jersey, on December 22, 1962. The complaint was dismissed and writ denied on June 27, 1963 in a decision by Schulman, J. An appeal was duly filed in the Appellate Division of the Superior Court of New Jersey. The Appellate Division of the Superior Court certified the cause without hearing or decision to the Supreme Court of New Jersey. The Supreme Court of New Jersey on March 17, 1964, in a per curiam opinion affirmed the judgment of the Hudson County Court.

QUESTIONS PRESENTED

1. Was accused's constitutional rights under the Due Process Clause of the Fourteenth Amendment violated where:

(a) The prosecutor suppresses and withholds without notice to defense or the Court the testimony of the only eyewitness to the homicide who could provide the accurate and detailed facts as to what transpired between the defendant and the deceased at the scene merely because it was favorable to the accused as to guilt and penalty and militated against the theory of the State that defendant stalked the deceased to commit cold-blooded murder?

(b) The prosecutor denied defense counsel the right to examine a police statement of said key witness which would have enabled him to develop favorable evidence which the witness omitted and could not recall on the witness stand?

2. Are an accused's rights to a fair and impartial trial under the Due Process Clause of the Fourteenth Amendment dependent upon judicial grace or discretion?

3. Does a decision of an appellate court dismissing an appeal from a judgment of conviction, involving only trial errors, preclude the accused from raising constitutional questions dealing with the same subject matter in a habeas corpus proceeding?

CONSTITUTIONAL PROVISIONS INVOLVED

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner was convicted of murder in the first degree in the Hudson County Court of New Jersey and sentenced to life imprisonment. The judgment of conviction, on his appeal involving non-constitutional assignments of error, was affirmed by the Supreme Court of New Jersey. *State vs. King*, 37 N.J. 285, 181 A. 2d 158.

Thereafter, petitioner instituted a habeas corpus proceeding in the Law Division of the Superior Court of Hudson County. The complaint for a writ of habeas corpus was specifically grounded upon violation

of petitioner's rights under the Due Process Clause of the Fourteenth Amendment on the claim that the Prosecutor withheld material evidence favoring accused as to guilt and penalty (paragraphs 11, and 12 of complaint, appendix 4a, 5a).

The County Court, in an opinion by Schulman J. dismissed the Complaint without hearing on the grounds that the pleadings did not set forth any constitutional question of any merit or substance requiring the issuance of a writ of habeas corpus (appendix 12a-16a).

Petitioner appealed from said judgment of dismissal to the Appellate Division of the Superior Court of New Jersey but that Court, without hearing, certified the cause to the Supreme Court of New Jersey. The Supreme Court of New Jersey on March 17, 1964 in a per curiam opinion affirmed the judgment of dismissal for the following reasons: "The issues now raised are identical with the issues heretofore raised and adjudicated on appeal to this Court. State vs. King, 37 N.J. 285 (1962). The posing of these questions in pseudo-constitutional guise adds nothing new for consideration. Affirmed."

In *State vs. King,* supra, constitutional questions were not raised or decided. Only five grounds, all involving trial error, were advanced (*State vs. King,* supra, at p. 292). Only grounds 4 and 5 involved witness Finn. Assignment 4 claimed improper and prejudicial cross-examination of witness Finn. This assignment was overruled by the Court because no

objection was taken to the cross-examination, and the cross-examination related to matters developed under direct. Ground 5 merely related to the refusal of the Court to allow counsel for defense to examine the written statement of witness Finn. The Court, after reading the statement, decided that the trial Court did not abuse its discretion in withholding the statement (*State vs. King,* supra, at pp. 303, 304).

The supporting facts upon which petitioner claims suppression of material evidence by the prosecution as a denial of Constitutional rights under the Due Process Clause of the Fourteenth Amendment are established by the Complaint for writ of habeas corpus and the police statement of eyewitness Finn which was appended thereto as Exhibit A (appendix 1a-11a). The homicide occurred at the Sawdust Trail Tavern in Union City, Hudson County, New Jersey.

The victim of the homicide was Arlene McCrystal, nicknamed Mickey. She and petitioner lived together as husband and wife but the relationship was not always harmonious. She and three companions entered the tavern at about 11:00 o'clock p.m. and took places at the bar where petitioner was already seated.

An altercation developed between Petitioner and Mickey which culminated in the homicide. Police investigation located five eyewitnesses to the slaying. They were interviewed by the police and their signed statements were delivered to the Prosecutor. Four of the eyewitnesses were the friends and companions

who accompanied deceased to the tavern; the fifth was the proprietress of the tavern. The State sought a conviction of murder in the first degree on the theory that petitioner, a disgruntled lover, was looking for and trying to locate deceased in furtherance of a preconceived design to take her life. The theory of the defense was that at the time of the shooting defendant was mentally incapable of perpetrating premeditated murder because of the excessive drinking and that the shooting was precipitated by the aggressive and offensive behavior of deceased. The five eyewitnesses to the homicide were present in the Courtroom under state subpoena. The Prosecutor desirous only of shaping the State's case to coincide with the theory that the defendant stalked deceased to kill her in cold blood, without provocation, called on behalf of the State only four of the five who testified in detail as to the shooting but knew little or nothing as to conduct and behavior of the parties prior to the shooting. The fifth eyewitness, Lee Finn, a friend and companion of deceased as shown by her statement which is appended to the Complaint, was able to offer detailed testimony both as to the shooting and the events leading up to it. The Prosecutor did not call eyewitness Finn as a State witness because her testimony would have favored the defendant as to the offensive conduct of deceased and passive and conciliatory behavior of Petitioner. The failure to notify the Court and defendant of the presence of this witness in the Courtroom is further proof of the intention to withhold the evidence from defendant

and to deprive him of the benefit thereof. After the State closed—during a recess—Lee Finn accosted defense counsel and told him the girls who testified for the State gave untrue or inaccurate testimony. Counsel without prior preparation, put her on the stand and asked her to testify as to her knowledge of the facts. She gave such testimony as she was able from her memory and when asked if there was anything further she stated she was unable to say without referring to the written statement she had given to the police. Counsel for the defendant requested the prosecutor to produce the statement for examination so as to ascertain whether the witness had omitted anything but the Prosecutor refused to allow counsel to examine the statement. The Court, however, ruled that the witness but not defense counsel could read the statement to determine whether she omitted any material facts.

The refusal of the Prosecutor to produce the statement to aid in developing further material evidence from the witness was prejudicial.

Defendant was unable to prove and the jury never knew that the provocation was more severe than the witness related on the stand; that it was not sporadic but was constant; that the abuse was not limited to obscene and degrading insults but on at least three occasions was accompanied by pushing; that throughout the episode defendant said he would drink no more as he was drunk enough; and that deceased failed to heed advice to stop her aggressive

and offensive conduct as she was pushing defendant too far. This evidence, developed in totality, would have placed the defendant in a much more favorable light before the jury and would have served to corroborate his unsupported testimony that he did not intend to kill, that he was woosy from drink and that deceased was pushing him around.

The trial tactics of the prosecution to deprive defendant of said favorable evidence was not limited to failure to present all material evidence to the Court and Jury. During cross-examination of the witness and in summation to the jury the prosecutor unfairly contended that she was an interested and biased witness for defendant and that her testimony as to the provocative behavior of deceased toward defendant was untrue although the State was unable to produce any evidence in contradiction thereof.

It was reprehensible for the Prosecutor to contend during the trial to the Court and jury that deceased was not guilty of provocative conduct when evidence in his file showed that she did provoke defendant. Defendant, as an accused was entitled to know and have this evidence under rights guaranteed by the Constitution of the United States. The prosecutor, by unfair trial tactics withheld the evidence and deprived defendant of the full benefit thereof.

REASONS FOR GRANTING THE WRIT

I.

The questions involved are of paramount importance in the administration of criminal justice. The decision of the Court below, as applied, will operate oppressively against every person charged with or convicted of crime in the state courts. Criminal trials will be conducted without regard for standards of justice guaranteed under the federal constitution. The prosecutor in the role of architect will be able to shape a trial by withholding witnesses and material evidence favoring an accused. The prosecutor will not be required to present all material evidence to the Court and jury. Hapless defendants convicted by such trial tactics, seeking redress for denial of federal constitutional rights, under obligation to exhaust state remedies will be unable to obtain relief under habeas corpus because the New Jersey Courts have rejected or repudiated principles of constitutional law established by the decisions of this Court. In such cases inalienable rights guaranteed under federal constitution will be dependent upon judicial favor or discretion. Suppression by the prosecution of material evidence favoring an accused will be deemed pseudo-constitutional.

II.

The Court below stated "The issues now raised are identical with the issues heretofore raised and adjudicated on appeal to this Court. State vs. King, 37 N.J. 285 . . . The posing of these questions in pseudo-constitutional guise adds nothing new for consideration . . ."

In *Brady vs. Maryland*, 373 U.S. 83, the Court held that the suppression by the prosecutor of a statement favorable to an accused upon request violates due process.

In *State vs. King*, supra, the Court decided that petitioner's right to the Finn statement which defense counsel requested of the prosecutor to aid in developing favorable evidence was subject to the discretion of the trial judge. This Court in *Roller vs. Holly*, 176 U.S. 521, decided that constitutional rights to due process rests upon a basis more substantial than favor or discretion.

III.

The Complaint for writ of habeas corpus established deliberate suppression by the prosecutor of the evidence of witness Finn. The Court below ruled that the facts established in the Complaint were pseudo-constitutional. In effect the Supreme Court of New Jersey ruled that suppression by a prosecutor of evidence favoring defendant as to guilt or punishment was not an issue of constitutional dimension.

This Court in *Pyle vs. Kansas*, 317 U.S. 213, and *Bute vs. Illinois*, 333 U.S. 640, decided that the deliberate suppression by the prosecution of evidence favorable to an accused was a deprivation of rights guaranteed by the constitution of the United States.

IV.

The Court below decided that Petitioner's right to maintain said habeas corpus action was foreclosed by the decision on appeal from judgment of conviction in *State vs. King*, supra. In effect, it applied the doctrine of res judicata. The principle of res judicata is not applicable to habeas corpus proceedings where constitutional rights and issues are raised: *Waley vs. Johnson*, 316 U.S. 101.

V.

Every person convicted in the state courts claiming denial of federal rights will be irreparably prejudiced by the decision in this case. They are required to exhaust state remedies before they can seek federal habeas corpus. Habeas corpus is intended to provide a remedy to obtain prompt and fair criminal justice for denial of constitutional rights. Under the impact of the said decision habeas corpus will become an unnecessary burdensome step in processing federal claims. The New Jersey Courts as shown here, however meritorious the cause, will not be bound by the principles and standards established by this Court but will apply its own standards which are in direct conflict therewith. State prisoners will have little

or no prospect of redress if rights guaranteed under the Federal Constitution are, as shown here, held to be subject to judicial favor or discretion.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted.

SAMUEL KAGLE,

OSCAR BROWN,

IVAN C. BASH,

Counsel for Petitioner.

May 8, 1964

APPENDIX

SUPREME COURT OF NEW JERSEY

A-84 September Term 1963

Edward A. King,
Plaintiff-Appellant.

vs.

Howard Yaegar, Warden, New Jersey State Prison.
Defendant-Respondent.

Argued March 2, 1964—Decided.

Mr. Samuel Kagel, a member of the Pennsylvania Bar, argued the cause for Plaintiff-Appellant (*Mr. Ivan C. Bash,* attorney).

Mr. Gregory J. Castano, Assistant Prosecutor of Hudson County, argued the cause for Defendant-Respondent (Mr. James A. Tumulty, Jr., Prosecutor).

The opinion of the Court was delivered

PER CURIAM.

The defendant appeals from the refusal of the Hudson County Court to issue a writ of *habeas corpus* and adjudicate the case on its merits.

The issues now raised are identical with the issues heretofore raised and adjudicated on appeal to this court. State v. King, 37 N. J. 285 (1962). The posing of these questions in pseudo-constitutional guise adds nothing new for consideration.

Affirmed.